

Expungement of Discipline Records:

A Discussion Paper

Prepared for the Office of the Police Complaint Commissioner

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1. Introduction

I have been asked by Mr. Don Morrison, Police Complaint Commissioner, to draft a discussion paper concerning expungement of police officers' discipline histories. The discussion paper is intended to serve as the starting point in consultations with interested parties, perhaps leading to a guideline, policy or other appropriate response to this issue.

In the course of researching and drafting the discussion paper, I contacted a variety of organizations in British Columbia to invite participation, and discussed the issue with representatives from police management, associations and the legal profession outside of the province. I have also reviewed the formal legal opinion of February 8 to the Office of the Police Complaint Commissioner, provided by Joseph Doyle of Douglas Symes and Brissenden, as well as Murray Mollard's March 15 reply to that opinion, on behalf of the British Columbia Civil Liberties Association.

As discussed below, expungement of police officers' discipline histories has generated some debate because expungement was explicitly provided for under the *Police Act* disciplinary scheme before its amendment by the *Police Amendment Act, 1997*, but the "new" Part 9 is silent on the issue.

2. B.C. Legislative History

Among the significant changes the *Police Amendment Act, 1997* made to the legal structure governing police conduct was to establish three categories of possible complaints – public trust, service or policy and internal discipline – and move away from the artificial distinction between the internal police discipline process and the public complaint process that existed under the pre-1997 scheme.

The scheme that formerly governed internal discipline, however, expressly provided for an expungement process, summarized as follows:

- the police employer was required to maintain a "service record of discipline" respecting "each member against whom a disciplinary default has been registered"
- an affected member seeking expungement of an entry on the service record was required to formally apply, but upon such application, the chief constable was required to order that the entry be expunged in accordance with s. 48(2) of B.C. Reg. 330/75

- o a member who received an *informal reprimand* under s. 7(9) of B.C. Reg. 330/75 had a right to expungement after one year
- o a member who received a *formal reprimand* under s. 33(1)(f) had a right to expungement after two years
- o a member who received a *fine or suspension* under s. 33(1)(d) or (e) had a right to expungement after three years
- o a member who received a *demotion* under s. 33(1)(c) had a right to expungement after five years

The issue of expungement was briefly considered in the Policing in British Columbia Commission of Inquiry's report, *Closing the Gap: Policing and the Community* (the "Oppal Commission Report"), the relevant portion of which reads as follows:

The Police Chiefs submitted that the one-year period for informal reprimands prevents a tribunal that is hearing a disciplinary matter from seeing a pattern of repeat informal reprimands in an officer's behaviour. An officer who averages one reprimand a year may have the record expunged so that consistently poor performance does not come to the attention of police administrators. On the other hand, the Federation of Police Officers expressed concern that formal reprimands were required to stay on an officer's record for two years while informal ones could be expunged after a year. They also urged that removal should be automatic rather than at the request of the officer.

These concerns are best met by requiring all written reprimands, imposed through either the informal or formal process, to be expunged two years after the date the penalty was imposed. It is also fair and efficient to allow disciplinary records to be automatically expunged after the appropriate time has elapsed, rather than requiring the extra step of a request by the officer.

It is unclear, as the British Columbia Civil Liberties Association points out, whether the Oppal Commission Report's remarks in this regard apply to dispositions beyond written reprimands.

The Oppal Commission's views in this regard were not implemented when the new scheme came into force in July, 1998. The "new" Part 9 does address service records of discipline in s. 65.3:

- (1) The service record of discipline of a respondent must record the complaint dispositions in respect of all complaints against the respondent whether processed as public trust complaints or as internal discipline complaints.
- (2) The service record of discipline of a respondent must be kept by the discipline authority in a secure place separate from the respondent's personnel file and the service record of discipline, without the discipline authority's authorization or the respondent's consent, may be disclosed only to the following persons:
 - (a) the respondent;
 - (b) the discipline authority;
 - (c) the police complaint commissioner;
 - (d) an adjudicator;
 - (e) if the respondent is a member of a police union, an arbitrator appointed under the collective agreement.
- (3) If a disciplinary or corrective measure is imposed on or agreed to by a respondent, and the measure includes treatment, counselling or some other program, the respondent's service record of discipline must be updated by the discipline authority to indicate whether the treatment, counselling or other program was completed.
- (4) Nothing in this section precludes the internal use of a service record of discipline for non-disciplinary action, including, without limitation, promotion, transfer and reassignment.

The Code of Professional Conduct Regulation, B.C. Reg. 205/98, is also relevant in discussing expungement. Section 19(4) codifies the existing law that a decision regarding a disposition in misconduct matters must consider, among

other aggravating and mitigating factors, the respondent's employment history:

(4) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures for a breach of this Code by a police officer of a municipal police department, including, without limitation,

...

(b) the police officer's record of employment as a police officer, including, without limitation, his or her service record of discipline, if any, and any other current record concerning past discipline defaults

In other jurisdictions, the approach to expungement varies widely, both in terms of its availability, and the legal vehicle used. In Ontario, for example, expungement is available only in limited circumstances, and governed by statute. Sections 64(15) and (16) of the *Police Services Act* are relevant to expungement:

(15) If an informal resolution of the matter is attempted but not achieved under subsection (11) [which involves defaults not of a serious nature], the following rules apply:

1. The chief of police shall provide the police officer with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.

2. Subject to paragraph 3, the chief of police may impose on the police officer the penalty described in clause 68 (1) (e) [forfeiture of not more than three days' pay] and may take any other action described in subsection 68 (5) [reprimand and remedial dispositions] and may cause an entry concerning the matter, the penalty imposed or action taken and the police officer's reply to be made in his or her employment record.

3. If the police officer refuses to accept the penalty imposed or action taken, the chief of police shall not impose a penalty or take any other action or cause any entry to be made in the police officer's employment record, but shall hold a hearing under subsection (7).

(16) An entry made in the police officer's employment record under paragraph 2 of subsection (15) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part.

In Alberta, expungement is governed by regulation, and is more widely available. Alta. Reg. 356/90 provides as follows in s. 22:

(1) When a period of 5 years has elapsed from the day that punishment is imposed on a police officer for a contravention of section 5 [which contains discipline offences], any record of the disciplinary proceedings respecting the punishment or the contravention shall

(a) be removed from the police officer's file and destroyed, and

(b) not be used or referred to in any future proceedings respecting that police officer.

(2) When a period of three years has elapsed from the day an official warning was issued to a police officer, the official warning shall

(a) be removed from the police officer's file and destroyed, and

(b) not be used or referred to in any future proceedings respecting that police officer.

3. The Evolution of the Process

The wisdom of any approach regarding expungement of discipline histories must be measured against the purposes of the discipline scheme. It is widely thought that police discipline schemes serve to ensure community protection, maintenance of proper standards within police forces and public confidence in the constabulary.

Historically, discipline schemes in most jurisdictions had a distinctly military and criminal law flavour. Codes of conduct, for example, imported military terms (such as "insubordination"), rather than terminology more in keeping with professional codes of ethics. Discipline schemes, moreover, embraced military processes, especially hearings which were akin to administrative courts martial. They also had a very narrow purport: the traditional approach focussed on specific acts of individual misconduct, with a view to exacting a "punishment" where an "offence" was established after a "charge" was laid. Much of what these schemes had to offer was intrinsically punitive in nature.

The traditional approach was the subject of significant critical scrutiny over the years. As early as 1976, the remedial philosophy of discipline was preferred by the Marin Commission, which offered the following view in its *Report*:

Not all problems giving rise to breaches of discipline, misconduct or unsatisfactory job performance can be corrected through the use of punishment. While a remedial approach to discipline recognizes that sanctions may sometimes be necessary, it also recognizes that there are many situations in which punishment is not only inappropriate, but unfair.

Problems of performance and conduct may be due to inconsistencies between rules, regulations and directives and the operational requirements of policing. In other cases, local conditions such as shortage of adequate manpower, ineffective leadership and supervision or a protracted stress situation may give rise to problems of either conduct or performance.

In a remedial system, steps would be taken to ensure that, before punitive action of any sort was taken, the above considerations had been reviewed and precluded as contributing factors of any significance. Only if a supervisor is assured that a particular difficulty relates primarily to the individual concerned should punishment of any sort be imposed [...] If a problem results from circumstances over which the individual has no control, it is obvious that unless the circumstances are changed the problem will not be remedied by attempting to correct the behaviour of the individual.

Even in those cases where the individual is the source of the problem, punishment may not be the appropriate response. An inability to adjust to local conditions, inadequate training, a lack of familiarization with new requirements and regulations or a personality clash with a supervisor may account for whatever difficulty arises. Here again, accurate identification of the source of a difficulty must preclude any disciplinary action, punitive or non-punitive.

When discipline is necessary, an approach which seeks to correct and educate a member should precede one that seeks to assign blame and impose punishment.

The Report recommended:

Where conditions beyond the responsibility of the member are found to be contributing factors to problems of either performance or conduct, no disciplinary action should be taken. Rather, a supervisor should report such matters and take whatever corrective action he deems necessary.

The Oppal Commission Report adopted a similar philosophical approach. It concluded that "in keeping with current management strategies, the primary objective of the discipline procedure ought to be remedial rather than punitive, and that this should be reflected in the appropriate legislation."

Historical approaches have evolved, if sometimes incrementally. This evolution has been particularly evident in the last twenty years. Some terminology has changed. In B.C., at least, the court martial approach to the hearing process has been modified, and the principal formal processes now involve a discipline proceeding and public hearing. As indicated earlier in this paper, the legislators moved away in large measure from the idea that the internal discipline process and the public complaint process should be separate. The traditional focus on whether an individual police officer has committed an act of misconduct has diminished somewhat, and the *Police Amendment Act, 1997* has modified the legal structure governing police conduct to establish three categories of possible complaints: public trust, service or policy and internal discipline. The new B.C. scheme considers whether a matter reveals organizational or

administrative practices within a police agency which require consideration.

Of particular importance under the new scheme is the statement of purposes set out in s. 2 of the Code of Professional Conduct Regulation, which states that the purposes of the Code are as follows:

- (a) to establish a code of conduct that is applicable to and acts as a general guide for police officers in the performance of their duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to police officers,
- (b) to establish guidelines for municipal police departments and discipline authorities concerning appropriate disciplinary or corrective measures in respect of police officers,
- (c) to assist municipal police departments in delivering fair, impartial and effective police services to the communities they serve, and
- (d) to maintain public confidence in the police by ensuring that police are accountable to the public in a way that is fair to police officers and to members of the public and does not unduly interfere with the ability of police officers to carry out their duties.

The Code of Professional Conduct Regulation also replaces "punishments" with "disciplinary or corrective measures" which are much more remedial than has historically been the case. Such measures now include transfer and reassignment, close supervision, special training and counselling. The Code also specifically provides that, in cases where disciplinary or corrective measures are necessary, "an approach that seeks to correct and educate the police officer concerned takes precedence over one that seeks to blame and punish," unless the choice is unworkable or would bring the administration of discipline into disrepute.

4. The Role of Expungement Under the "New" Part 9

The policy considerations favouring expungement distill to one principal argument: clearing a discipline history accords with the remedial principles of the new Part 9 scheme. The point is succinctly made by Joseph Doyle in his February 8 legal opinion:

It seems consistent with the overriding goal of correction and education that, after the lapse of a significant period of time from the imposition of measures for a default, the service record of discipline should be "cleared" or "expunged". As noted above, this is hardly a new concept to police discipline, for it existed under the regulations to the *Former Police Act*. Indeed, even in the criminal law provision is made for pardons after varying periods of time, depending on the nature of the underlying offence. It seems compelling that providing an officer with the opportunity to keep their slate "clean" and ultimately clear their service record of discipline is an important final step in a remedial disciplinary system.

The contrary policy considerations are several. The first involves the risk arising from automatic expungement after a specified time. The concern in this regard is that expungement is an important process and should not be undertaken without an examination of the merits of individual cases. One response to this concern would see chief constables authorized to consider applications for expungement on an individual basis, which would be a modification of the approach under B.C. Reg. 330/75, under which police officers were required to make an application, but a chief constable had no ability to decline the application. A further variation would see the disciplinary authority or adjudicator make a recommendation at the time of decision regarding the wisdom of expunging the particular default. There is some precedent for this approach elsewhere in Canada. In one case, *Soley and Ontario Provincial Police*, the Commission allowed an appeal against penalty, and reduced the disposition to a reprimand. The panel appeared to view the misconduct as reasonably trivial, and concluded its decision with the following comments:

The Commission also recommends that all references to the charge and conviction ... or the hearing, be removed from the Officer's employment record, and the matter shall not be taken into account for any purposes relating to his employment, if for a

period of two years from the date of this hearing, no other entries concerning misconduct have been made in Constable Soley's record.

Since the initial decision maker could not predict the police officer's behaviour, any "pre-emptive" expungement would likely need to insert the qualification of a clean service record over the period of time stipulated, as the Commission did in *Soley*.

The second contrary policy consideration involves the concern that subsequent decision makers should have as complete a picture as possible, should further discipline matters arise. The British Columbia Civil Liberties Association argues that "there is no principled justification for requiring expungement ... based on some specific timetable", and a disciplinary authority or adjudicator "should have access to all incidents of default in the service record of discipline to decide whether they are relevant to current discipline matters". The Association argues that stale defaults will likely carry little or no weight, but that the decision maker should be in a position to make that assessment. The Association agrees that police officers should not be unfairly treated by historic defaults, but states that automatic expungement is not the appropriate remedy to prevent such unfairness. This argument, reduced to its essence, would see historic defaults considered on an individual basis should a further discipline matter occur. The issue here, however, is whether there is a point beyond which demonstrably minor misconduct should be removed from official records. A police officer who commits minor misconduct early in his or her career would argue that he or she ought not to bear the consequences for thirty years.

The third policy argument deals with the expungement timetable. The British Columbia Civil Liberties Association, for example, has argued that serious misconduct should not qualify for early expungement. The waiting periods attendant upon particular disciplinary or corrective measures are open to debate, and one proposal submitted to the Office of the Police Complaint Commissioner suggested waiting periods of three, five and ten years, depending on the nature of the original matter.

There is a problem, as well, with the legal value of an expungement, particularly if it is effected through an agreement or similar vehicle, and not by way of statute or regulation. In one police agency outside of British Columbia, the employer and association have addressed expungement in the agreement, which, subject to various conditions and differing time periods, provides for comprehensive expungement of "personnel" files respecting negative documentation and admonishments for informal discipline penalties, records of formal discipline penalties, records of any criminal and or provincial offence in which there was a withdrawal or dismissal of charges, records of provincial offence convictions, and records of criminal offence convictions involving a conditional or absolute discharge. However, much of this information is also required in a second set of files ("complaint" files) which must, under statute, be retained for 25 years. Although expungement is available, it has an artificial aspect, and police officers are regularly asked to sift through archived complaint files to respond to applications by criminal defence lawyers for information regarding particular officers' discipline histories.

If it is agreed that expungement is desirable in one form or other, the question arises as to the appropriate legal vehicle to use. One vehicle to address expungement is a guideline. The police complaint commissioner has authority under s. 50(2)(j) to establish guidelines involving informal resolution of public trust complaints under s. 54.1, and under s. 50(3)(d) to "prepare guidelines respecting the procedures to be followed by a person receiving a complaint". As indicated in the discussion paper regarding off-duty conduct, however, there is some doubt surrounding the source of authority for a guideline on other matters. Moreover, there is uncertainty surrounding the legal status of a guideline. For these reasons, a guideline may well not be the preferred response.

A second vehicle would see the police complaint commissioner formulate a policy or informational report, or similar instrument. While there would seem to be no bar to the police complaint commissioner's authority to do so, however, there is a question regarding the effectiveness of such measures. A policy document, for example, has limited status in law.

Interested parties may see some advantage to a statutory or regulatory response. The advantage, of course, is that statutes and regulations have the force of law. As indicated above, this approach has precedent in other jurisdictions.

All of which is respectfully submitted.

"Paul Ceysens"